WP(C) 579/2007
BEFORE
HON'BLE JUSTICE RANJAN GOGOI
JUDGMENT AND ORDER

All these Writ Petitions involving common questions of law and facts were heard together and are being disposed of by this common order.

2. 38 (Thirty-eight) petitioners, in all, have joined together in the writ petitions under consideration to primarily challenge identical but separate orders dated 22.12.2006/26.12.2006 passed by the Director of Elementary Education, Government of Assam holding that the petitioners have no legal right to continue as teachers of the institutions in which they are serving. By the said orders dated 22.12.2006/26.12.2006 a further direction has been issued to the heads of the concerned institutions not to allow the petitioners to work.

3. Though the facts are long an attempt must be made to summarize and notice only what would be strictly required for the purpose of the present adjudication.

4. The petitioners are teachers of ME/MV/LP Schools. According to the petitioners, they were initially appointed on different dates in the month of December, 1999 following an advertisement issued by the then Bodoland Autonomous Council Authority, which has followed by a selection in which all the petitioners claim to have been selected. The appointment orders enclosed to the writ petitions appear to have been followed by subsequent orders adjusting most of the petitioners against non-plan vacancies and, thereafter, save and except 3(three) petitioners in WP(C) No.713/2007, i.e., petitioner Nos.6, 9 and 13, all of them were transferred along with their posts to Schools in the non-BTC/BTAD areas in the year 2005.Thisis a position emanating from the original records, perused by the Court, as made available by the learned Departmental Counsel.

Thereafter, it appears, identical show cause notices dated 8.9.2006 were issued to the petitioners by the Director of Elementary Education, Government of Assam stating that the initial appointments of the petitioners are not in accordance with the provisions of the Assam Elementary Education (Provincialisation) Rules 1977. The petitioners, by the aforesaid show cause notices were required to produce before the concerned authority the originals of their appointment orders. Most of the petitioners submitted their respective replies to the show cause notices received denying the allegations made. Thereafter, by the impugned orders dated 22.12.2006/26.12.2006 a conclusion had been reached that the petitioners have no legal right to continue and, therefore, directions have been issued not to allow them to work. Aggrieved, the writ petitions have been filed.

5. I have heard Sri A. Nath, learned counsel for the petitioners and Sri MR Pathak, learned Standing Counsel, Education. The Court has also received the assistance from Mrs M. Bordoloi, learned Standing Counsel, Bodoland Territorial Council, which body, however, has not been impleaded as a party in the present cases.

6. Before proceeding to consider the respective contentions advanced and to determine the tenability of the claims and counter claims made, it will be apposite to briefly notice the history behind the creation of the present day Bodoland Territorial Areas Districts (in short BTAD), which is a 6th Schedule Area administered by the Bodoland Autonomous Council.

The agitation in the Bodo areas culminated in the signing of the Bodo Accord in the year 1993 by and between the Government of India, Government of Assam and the Representatives of the Bodo people. Under the aforesaid Bodo Accord, a separate Bodoland comprising of the revenue district of Kokrajhar, parts of Bongaigaon

, Nalbari, Kamrup, Darrang and Barpeta Districts of the State of Assam under an Autonomous Council to be known as the Bodoland Autonomous Council (in short BAC) came to be formed. Certain specific subjects including education, primary as well as secondary, was contemplated to be vested in the said Autonomous Body for due administration of the said subjects by the said body. The State Legislature gave legislative sanction to the terms of the Bodo Accord by enacting the Bodoland Autonomous Council Act of 1993 (in short BAC Act, 1993).

7. With the passage of time the experiment under the BAC Act, 1993, did not appear to have satisfied the sentiments and aspirations of the people and, therefore, another Accord was signed in the year 2003. In terms of the said Accord the erstwhile BAC areas were to be included as a part of the Tribal Areas of the State of Assam under the 6th Schedule of the Constitution of India. Accordingly, the 6th Schedule to the Constitution (Amendment) Act, 2003 was enacted by the Union Parliament by including the areas identified in the subsequent Accord of 2003 as a 6th Schedule Area under the nomenclature Bodoland Territorial Areas Districts Paragraph 3B was added to the existing 6th Schedule vesting additional powers of making laws in the Bodoland Territorial Council which was formed to administer the newly created 6th Schedule Area. Of particular relevance to the present cases would be Item No.V of the newly inserted paragraph 3B, i.e., Education including Primary Education. From the above, it would be crystal clear that Primary Education is an exclusive subject of the authority, i.e., BTC, constituted under the Amended 6th Schedule to administer the areas included in the BTAD.

8. In the present case the petitioners assert that they were appointed pursuant to an advertisement issued and selection held by the then BAC Authority and that their appointments were in the schools located within the then BAC Areas. The BAC Authority or the present day BTC Authority has not been impleaded as a party Respondent in the present case. The Court, therefore, has been deprived of the stand of the BTC Authority on the aforesaid aspect of the claim of the petitioners. However, the State of Assam in the Education Department, which has been impleaded as a Respondent in the present case, has taken a categorical stand at the hearing on the basis of the records produced that all the petitioners, except the 3(three) already noticed, have been transferred subsequently to schools outside the BTAD Area from schools with the BTAD Area. The aforesaid position is also evident from the transfer orders enclosed to the writ petitions. What, therefore, appears to be undisputed, at this stage, is that the petitioners after being appointed in schools located within the BTAD had been transferred at a subsequent stage, to schools in the non-BTAD Areas along with their posts. If that be so, the Court will understand, at least on the materials available on record, that at the initial appointments of the petitioners were made by the then BAC in schools within the jurisdiction of the said authority. Under the provisions of either the BAC Act, 1993 or under paragraph 3B added to the 6th Schedule to the Constitution, Primary Education is an exclusive subject vested in the BAC/BTC Authority. Two consequences will emanate from the above position. If the BAC Authority had made the initial appointments of the petitioners, a position virtually admitted by the State, the State Government will not be competent to decide on the validity of the aforesaid appointments. The second consequence that will follow is that in view of the exclusiveness of the subjects enumerated under the BAC Act, 1993 and the Amended 6th Schedule, transfer of an incumbent appointed by the BAC and working in a school within the present day BTAD Areas along with the post to a school within the non-BTAD Areas will not be authorized by law.

9. If the aforesaid position is what should emerge from the provisions of the BAC Act, 1993 and the provisions of the 6th Schedule, as amended, it will be apparent that the show cause notices issued to the petitioners by alleging that the initial appointments are contrary to Rules and against non-existent posts and the findings recorded to the above effect in the impugned orders dated 22.12.2006/26.12.2006 would be beyond the competence, power and jurisdiction of the State Authorities. This is a matter that can only be determined by the present day

BTAD Authority under the Scheme contemplated by the provisions of the 6th Schedule to the Constitution, as amended.

10. As the petitioners were appointed in schools in the BTAD Areas and were thereafter transferred along with their posts to schools outside the BTAD Areas and such transfers are plainly contrary to the provisions of the Act and the 6th Schedule, it was open for the State Government to proceed to take necessary legal action against the said transfer orders on the aforesaid basis. However, nowhere in the show cause notices issued to the petitioners; neither in the impugned orders dated 22.12.2006 and 26.12.2006, any such stand has been taken by the State Government. The said stand not having been taken by the State Government, it is the considered view of the Court that the matter should rest at that and ought not to be proceeded any further by the Court. It is, however, made clear that notwithstanding the above view of the Court it will be open for the State Government to proceed in the matter in terms of the above observations and findings, if the State Government is so inclined and so advised.

11. This will bring the Court to a consideration of the cases of the 3(three) of the petitioners of WP(C) No.713/2007, i.e., petitioners Nos.6, 9 and 13 in the said case, who were initially appointed in non-BTAD Areas and are presently working in schools within the Pub Nalbari Elementary Education Block. It is to the aforesaid 3(three) petitioners that the contentions advanced in the writ petition against the impugned order dated 22/26.12.2006, which will have any relevance at all. The aforesaid contentions challenging the order dated 22/26/12/2006 are two-fold. Firstly, it is asserted that the petitioners were not in the know of the enquiry that was being conducted which has been referred to in the show cause notices and the impugned orders dated 22/26.12.2006. Secondly, it has been contended that before passing the impugned orders dated 22/26.12.2006, the Respondent State should have initiated regular departmental proceeding against the petitioners under the provisions of the Assam Services (Discipline and Appeal) Rules 1964. Violation of the principles of natural justice has been alleged on the aforesaid basis.

12. The enquiry that was conducted, as evident from the stand taken by the Director in the affidavit filed and the records offered for inspection of the Court, was in the nature of a general administrative enquiry held to determine the legality of appointments of a large number of LP/ME Schools Teachers in Nalbari District falling outside the BTAD Areas. It was a fact-finding enquiry with no specific disciplinary measure against any incumbent in mind. It is always open for the State Government to hold and conduct such enquiries if the circumstances of a given case so demand. Participation of an affected person in such an enquiry would be premature. However, if on the basis of such enquiry some penal action is contemplated, the affected incumbent naturally has to be afforded due opportunity. In the present case after the report of the enquiry was submitted, show cause notices were issued to the petitioners making a specific reference to the enquiry
held and the petitioners were asked to submit their original appointment orders. The materials placed before the Court indicate that none of the petitioners could or did produce the aforesaid appointment orders. The proceedings of the enquiry held also goes to show that no record of the selection of a large number of incumbents including the petitioners could be found . In such a situation if the authority took the view that the appointments made were invalid and on that basis held that the petitioners do not have any right to continue to work, no fault can be attributed to the view taken. Each of the three petitioners of the case presently under consideration was given an opportunity to show cause. The replies submitted by the petitioners were duly considered and thereafter the impugned orders dated 22/26.12.2006 have been passed. The principles of natural justice cannot extend to giving of a personal hearing in every case. The said principles are elastic and do not operate within a straitjacket formula. Their application will vary and depend on the facts of a given case. Consequently, the Court is of

the view that in the facts of the present case it cannot be said that the decisi on making process was vitiated on account of violation of the principles of natu ral justice.

13. The holding of a regular departmental proceeding against the petitioner, prior to their termination, as contended, cannot be visualized in the present c ase. No misconduct attracting any penal action was alleged against any of the pe titioners. Rather, what was alleged is that the initial appointments were illega l and contrary to the provisions of the Rules for which show cause notices were issued to the petitioners giving them an opportunity to explain and to substanti ate the legality of their appointments. The petitioners, according to the Respon dents, failed to do so thereby paving the way for the impugned action of termina tion. The sufficiency or adequacy of the justification for the impugned action s hould not be reviewed by the Court exercising the high prerogative power under A rticle 226 of the Constitution. If a conclusion has been reached by following a fair procedure as contemplated by law and the conclusion reached is a possible c onclusion, the scrutiny of the Writ Court must, normally, not extend any further .

14. In view of the discussions that have preceded all the writ petitions are partially allowed. The impugned orders dated 22/26.12.2006 in respect of the pe titioners who were transferred to schools in the non-BTAD Areas is hereby interf ered with liberty to the State and the B.T.C. to proceed, if so desired and so advised, in accordance with the observations and findings recorded in the presen t order. The impugned orders dated 22/26.12.2006 in so far as the 3(three) petit ioners in WP(C) No.713 of 2007 are concerned shall stand.